PENSONIC SALES & SERVICE SDN BHD A

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[CIVIL APPEAL NO: R1-14-09-2010]
8 NOVEMBER 2010

REVENUE LAW: *Income tax - Special Commissioners ('SCIT') - Deciding order of SCIT - Appeal against - Respondent issued additional/ reduced assessments to appellant - Whether part of assessments time-barred - Income Tax Act 1967 ('ITA'), s. 91(1) - Whether expenses for tour promotions, sponsorships, sales promotions and business trips incurred in production of income - Whether such expenses deductible under ITA* C D

Pursuant to a tax audit, the respondent issued to the appellant revised assessments under the Income Tax Act 1967 ('the Act') for years of assessment 2000, 2001, 2002, 2003 and 2004. A substantial amount in tax was consequently payable. The appellant appealed against the assessments to the Special Commissioners of Income Tax ('SCIT'). Before the SCIT, the appellant said that (i) the respondent was time-barred by s. 91(1) of the Act from disallowing in 2006, the utilization of capital allowances claimed for the years of assessment 1997 till 2000 which were brought forward and claimed in the year of assessment 2000 (ii) that a penalty in respect of the capital allowances under s. 113(2) of the Act should not have been imposed (iii) that expenses incurred for tour promotion, sponsorship, sales promotion and travelling were deductible under s. 33(1) of the Act as they were incurred in the production of income and (iv) that another penalty under s. 113(2) in connection with sponsorship and travelling should not have been imposed. E F G

The SCIT decided that (i) the respondent was time-barred from re-computing the assessment on the capital allowances for the years of assessment 1997 to 2000 (ii) consequently, the penalty imposed in respect of the capital allowances did not arise (iii) the respondent was correct in disallowing the expenses on tours, sales promotions, sponsorship and travelling as deductions under s. 33(1) and/or s. 39(1) of the Act and (iv) the penalty imposed under s. 113(2) in connection with the claims for sponsorship and travelling was correct. The appellant appealed against the SCIT's decision to the High Court by way of case stated. H I

Held (allowing appeal partly; setting aside penalties with costs):

(1) The respondent's notice of additional assessment dated 14 December 2006 and notice of reduced assessment dated 18 May 2007 disallowing the utilization of capital allowances claimed for the years of assessment 1997-2000 on preceding year basis were out of time as s. 91(1) provided that an assessment or additional assessment must be made in the year of assessment or within six years after its expiration. (para 17)

(2) The SCIT had not provided reasons why the expenses incurred for tours and sales promotions were caught by s. 39(1) of the Act. It was a mere statement without proper reference to or evaluation of the admitted or proved facts. The SCIT failed to consider that even though tour and sale promotions may involve some element of entertainment, the entertainment was 'necessarily inherent' in such activities. (para 30)

(3) The proved or admitted facts showed the tours and sales promotions were not given gratuitously. Therefore the expenditures incurred for tours and sales promotions were not caught by s. 39(1). (para 31)

(4) The SCIT erred in finding the appellant had not furnished proof of expenses incurred for sponsorships. The finding was contrary to the evidence. The appellant had in fact furnished ample evidence to support its claim in this regard. (para 33)

(5) The SCIT was correct in finding there was insufficient proof that the expenses incurred for business trips were wholly and exclusively for the production of income. (para 36)

[Appellant to pay RM1,200 costs and respondent to pay RM2,800 costs.]

Case(s) referred to:

ABC v. The Comptroller of Income Tax, Singapore [1959] 1 LNS 1 HC ***(refd)***

Arthur Murray (NSW) Pty Ltd v. Federal Commissioner Of Taxation [1965] 114 CLR 314 ***(refd)***

Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353 CA ***(refd)***

Bentleys, Stokes & Lowless v. Beeson [1952] 2 All ER 82 ***(refd)***

Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd [1980] 1 LNS 141 FC ***(refd)***
Lloyds Bank Export Finance Ltd v. Commissioner Of Inland Revenue [1992] 2 NZLR 1 ***(refd)***
Margaret Luping & Ors v. Ketua Pengarah Hasil Dalam Negeri [2000] 3 CLJ 409 CA ***(refd)***
RB Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1995] 2 MSTC 2,360 ***(refd)***
The King v. The Deputy Federal Commissioner Of Taxation For South Australia; Ex Parte Hooper [1926] 37 CLR 368 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 33(1), 39(1)(c), 91(1), 93, 113(2)

For the appellant - Vijey Krishnan (Kok Fie See with him); M/s Raja, Darryl & Loh
For the respondent - Noor Kamaliah Mohd Japeri; Inland Revenue Board

Reported by Ashok Kumar

JUDGMENT

Aziah Ali J:

[1] The appellant is a wholly owned subsidiary of Pensonic Holdings Berhad, a public company incorporated under the Companies Act 1965. The principal activity of the appellant is dealing in electronic products and all types of electrical home appliances.

[2] Pursuant to a tax audit carried out on 17, 18 and 21 April 2006, the respondent issued revised assessments under the Income Tax Act 1967 ("the Act") dated 18 May 2007 against the appellant in respect of years of assessment ("YA") 2000, 2001, 2002, 2003 and 2004 as follows:

Year of Assessment	Type of Assessment	Date of Assessment	Tax Payable (RM)
2000 (CYB)	Reduced	18.05.2007	1,815,653.49
2001	Reduced	18.05.2007	183,473.64
2002	Additional	18.05.2007	574,872.94
2003	Assessment	18.05.2007	259,135.80
2004	Additional	18.05.2007	1,532,647.61

[3] The appellant was dissatisfied with the assessments made by the respondent and lodged appeals dated 14 June 2007 to the Special Commissioners of Income Tax ("SCIT").

[4] The relevant facts admitted or proved before the SCIT are as follows:

(i) the only sales channel for the appellant's products is *via* its dealers. The appellant does not have retail outlets;

(ii) the dealers are not employees of the appellant but are instead the appellant's customers who purchase, promote and re-sell the appellant's products to consumers;

(iii) sales to the dealers account for 100% of the total sales of the appellant;

(iv) the dealers are not the appellant's exclusive dealers. They also act as dealers of the appellant's competitors;

(v) promotion of products and motivating and rewarding dealers are key components of operating and managing the appellant's business;

(vi) tour promotions, sponsorships and sales promotions are commonly incurred by all business competitors of appellant operating in Malaysia;

(vii) the captions or the terms "Tour Promotion", "Sales Promotion", "Sponsorship" and "Travelling" are only accounting classification adopted by the appellant and do not help in explaining the nature of these expenditures;

(viii) "Tour Promotion" is part of a trade discount and/or rebate structure practiced by the appellant and it represents part of the appellant's strategy to generate and encourage sales at the ultimate cost and expense of the dealers;

(ix) The trade discount/rebate package comprises two main elements:

(i) a declared percentage over total sales turnover paid by the dealers to the appellant, by way of credit notes or rebates, and

(ii) a trip given according to target achieved. A

It is the latter which is disputed by the respondent in this case;

(x) the trade discount/rebate is already imputed in the appellant's product price. Accordingly, it is the dealers who are ultimately bearing the cost of the Tour Promotion; B

(xi) even though the appellant's sales campaign brochure states that no credit note or cash *in lieu* of trip is allowed, the appellant actually does allow it as and when the dealers want the trade discount/rebate in the form of credit note; C

(xii) the trade discount or rebate in kind is given based on volume purchased. At the end of the day, the dealer who buys more pays less per unit purchased because of the trade discount or rebate in kind; D

(xiii) the trade discount or rebates effectively reduce the purchase price of products purchased for those who buy in higher volumes. For those who buy in lower volumes, the price per product is higher as they do not qualify for the trade discount or rebate in kind; E

(xiv) the profit margin for each product varies. Trade discounts/ rebates provided by the supplier makes the crucial difference as the product quality amongst most brands is quite similar these days; F

(xv) the trade discount/rebate package is announced to the dealers by the appellant at the beginning of every year *via* circular through the appellant's sales team; G

(xvi) the trade discount/rebate works in terms of getting a dealer to promote sales as the dealer tend to push harder at the end of the year to achieve the published targets and they do not want to lose out on what is in the trade discount/rebate package; H

(xvii) the trade discount/rebate in the form of trip gives the appellant the benefit of being able to put all the appellant's best dealers together for a few days and sharing with them the appellant's business plans; I

(xviii) it is the right of the dealers to the trade discount/rebate if they have achieved the target and the dealers are entitled to take legal action against the appellant if the appellant does not provide them the stipulated trade discount/rebate;

(xix) in the event where the appellant stops providing trade discounts/rebates, the dealers will focus on other brands;

(xx) the dealers do not regard trade discounts, be it rebate, credit note or trip as "free gifts" as they have to earn them;

(xxi) the appellant operates in an ultra competitive environment. The appellant has to be very cost-conscious so as to control the costs at all time;

(xxii) "Sponsorship" and "Sales Promotion" relates to (1) outlet opening, renovation, etc; (2) T shirts with Pensonic logo; (3) participating in a fair including anniversary sales; (4) opening of branch advertisement; (5) contribution to sales flyers; and (6) paying for logo to be shown at event.

(xxiii) the costs of "Sponsorship" and "Sales Promotion" are imputed in the appellant's product price and are given *via* credit notes or rebates. The dealers therefore ultimately bear the cost and expense of the same.

(xxiv) "Sponsorship" and "Sales Promotion" were incurred as part of the standard sales and promotional practice in electronics and home appliance sale industry;

(xxv) it is market practice that the suppliers get involved in brand and product promotion since the dealers are the main or only distribution channel and so it is in the interest of suppliers to ensure that their products are promoted most in dealer's outlet. The dealers do not bear such costs;

(xxvi) the appellant does not incur sales and promotional expenditure of any kind without being extremely calculative about it;

(xxvii) the appellant is not a manufacturing company but a trading company;

(xxviii) although the appellant's products are mainly sold in the local market, the appellant procures some of its products from foreign manufacturers, and hence there are a lot of instances where the appellant pays a visit to its foreign manufacturers' factory outlets to understand the operation of these factories, business meeting with the foreign manufacturers etc.;

(xxix) the business travels are primarily to meet the appellant's foreign business partners (the suppliers or manufacturers) to carry out market exploration and to participate in international exhibitions. Business trips are primarily undertaken by the managing director and purchasing manager of the company for genuine business purposes and calculated to bring benefit to the company.

[5] The issues for determination by the SCIT are as follows:

(i) Whether the respondent is correct in disallowing the utilisation in the Year of Assessment 2000 (current year basis) of capital allowance amounting to RM500,198 which were claimed under sch. 3 of the ITA and brought forward to the Year of Assessment 2000 (current year basis) from the years of Assessment 1997 to 2000 (preceding year basis);

(ii) Whether the respondent is correct in imposing a penalty under s. 113(2) of the ITA amounting to RM63,024.95 for the Year of Assessment 2000 (current year basis) in connection with the above;

(iii) Whether the respondent is correct in disallowing a deduction of (i) RM602,118; (ii) RM558,693; (iii) RM894,479; and (iv) RM342,465 in computing the adjusted income of the appellant's business for the Years of Assessment 2001, 2002, 2003 and 2004 respectively ("tour promotion"), all of which were incurred in relation to sales activities of the appellant;

(iv) Whether the respondent is correct in disallowing a deduction of (i) RM54,147; (ii) RM30,284; (iii) RM72,909; and (iv) RM30,625 in computing the adjusted income of the appellant's business for the Years of Assessment 2001, 2002, 2003 and 2004 respectively ("sponsorship"), all of which were incurred in relation to sales activities of the appellant;

(v) Whether the respondent is correct in disallowing a deduction of (i) RM3,910; (ii) RM76,386; (iii) RM39,959; and (iv) RM86,508 in computing the adjustment income of the appellant's business for the Years of Assessment 2001, 2002, 2003 and 2004 respectively ("sales promotion"), all of which were incurred in relation to sales activities of the appellant;

(vi) Whether the respondent is correct in disallowing a deduction of (i) RM100,858; (ii) RM60,541; (iii) RM32,806; and (iv) RM21,841 in computing the adjusted income of the appellant's business for the Years of Assessment 2001, 2002, 2003 and 2004 respectively ("travelling"), all of which were incurred in relation to business activities of the appellant.

(vii) Whether the respondent is correct in imposing penalty under s. 113(2) of the Act at the rate 45% for the Years of Assessment 2002 and 2004 respectively in connection with paragraph (iv) and (vi) above.

[6] Before the SCIT the appellant contended that:

(a) the respondent is time-barred from disallowing in 2006, the utilisation of capital allowances for the Year of Assessment 2000 (current year basis) which have been brought forward from the Years of Assessments 1997 to 2000 (preceding year basis). The penalty under s. 113(2) of the Act in connection with the capital allowances should not be imposed on the appellant;

(b) the tour promotion, sponsorship, sales promotion and travelling expenses are deductible under s. 33(1) of the Act as they are incurred in the production of income of the appellant in getting, maintaining and increasing sales of the appellant, and the tour promotion, sponsorship, sales promotion and travelling expenses do not fall within the ambit of s. 39(1) of the Act. The penalty under s. 113(2) of the Act in connection with the sponsorship and the travelling should not be imposed on the appellant.

[7] For the respondent it was contended that:

(a) the appellant is not entitled to claim the aforesaid capital allowances for items such as public beautification, industrial building and light industrial factory for the Years of

Assessment 1997 to 2000 (preceding year basis) hence the respondent is correct in disallowing the utilisation of the capital allowances in the Year of Assessment 2000 (current year basis);

(b) the respondent disallowed the tour promotion, sponsorships, sales promotion and travelling expenses because it is caught under s. 39(1) of the ITA.

[8] On the first issue, the SCIT cited the case of *ABC v. The Comptroller of Income Tax, Singapore* [1959] 1 LNS 1 in which the court said that the notice of assessment is not an "assessment". Rather it is the act or operation of the commissioner in ascertaining the amount of tax chargeable on a consideration of all relevant circumstances that amounts to an "assessment". The SCIT found that re-computation is tantamount to an "assessment". Hence the SCIT decided that by virtue of s. 91(1) of ITA the respondent is time-barred from re-computing the assessment on the account of the capital allowances for the Years of Assessment 1997 to 2000 (preceding year basis). Consequently the SCIT allowed the appeal. Therefore the penalty imposed does not arise.

[9] On the issue of tour and sales promotions, the SCIT found that these expenses are caught under s. 39(1) even though it was incurred wholly and exclusively for the production of income. In respect of sponsorships, the SCIT also found that the appellant had failed to furnish evidence to prove that the expenses on sponsorships were actually incurred. The SCIT further found that the appellant had failed to prove that the trips were actually business trips wholly and exclusively for the production of income. Therefore the SCIT found the respondent is correct in disallowing the expenses on tour and sales promotions, sponsorship and travelling. The SCIT unanimously dismissed the appeal.

[10] By a deciding order dated 3 November 2009 the SCIT made the following order:

> ADALAH DIPUTUSKAN bahawa Responden tidak berhak untuk menaksir semula taksiran bagi Tahun-tahun Taksiran 1997 hingga 2000 (asas tahun sebelum) mengikut peruntukan seksyen 91(1) Akta Cukai Pendapatan 1967 (Akta tersebut) dan penalti yang dikenakan berkaitan dengan perkara ini mengikut peruntukan seksyen 113(2) Akta tersebut hendaklah dibatalkan

A JUGA ADALAH DIPUTUSKAN bahawa perbelanjaan galakan pelancongan, penajaan, galakan jualan dan perbelanjaan adalah perbelanjaan yang tidak dibenarkan sebagai potongan di bawah peruntukan seksyen 33(1) dan/atau seksyen 39(1) Akta tersebut dan penalti yang dikenakan berkaitan dengan perkara ini mengikut peruntukan seksyen 113(2) Akta tersebut adalah dikekalkan

B

[11] By way of this case stated the issues for determination are:

(a) whether the respondent is time-barred under s. 91(1) of the Act from disallowing in 2006, the utilisation of capital
C allowances for the Year of Assessment 2000 (current year basis) which have been brought forward from the Years of Assessments 1997 to 2000 (preceding year basis) and the penalty imposed therefore in accordance with s. 113(2) of the ITA shall be cancelled; and

D

(b) whether the tour promotion, sponsorship, sales promotion and travelling are expenditure not allowed as deduction under s. 33(1) and/or s. 39(1) of the Act and the penalty imposed therefore in accordance with s. 113(2) of the Act shall be maintained.

E

Issue Of Time Bar Under s. 91(1) ITA

[12] Counsel for the appellant submits that the SCIT was correct in finding that the respondent is time-barred under s. 91(1) from
F disallowing in 2006, the utilisation of capital allowances of RM500,198 for the Year of Assessment 2000 (current year basis) which have been brought forward from the Years of Assessments 1997 to 2000 (preceding year basis). It is submitted that the re-computation of the assessment for the Years of Assessments 1997
G to 2000 (preceding year basis) amounts to an "assessment" (*ABC v. The Comptroller of Income Tax Singapore (supra)*; *Lloyds Bank Export Finance Ltd v. Commissioner of Inland Revenue* [1992] 2 NZLR 1, Privy Council). It is submitted that the respondent's act of re-computing the assessments for the Years of Assessments
H 1997 to 2000 (preceding year basis) and disallowing, in 2006, the utilisation of capital allowance which have been brought forward from the Years of Assessments 1997 to 2000 is clearly in contravention of s. 91(1). Therefore the penalty under s. 113(2) ought not to be imposed.

I

[13] For the respondent counsel submits that the issue of time bar does not arise as what had been done by the respondent was a re-computation and revision of the assessment for Year of Assessment 2000 (current year). In support counsel refers to s. 93 of ITA and the notice of assessment exh. C2. Counsel submits that a re-computation is not an assessment and therefore s. 91(1) does not apply.

Decision

[14] Section 91(1) prescribes a six year time limit on the respondent to make an assessment or additional assessment when it appears to the respondent that for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax. Section 91(1) provides as follows:

> 91. Assessments and additional assessments in certain cases.
>
> (1) The Director General, where for any year of assessment it appears to him that **no or no sufficient assessment has been made** on a person chargeable to tax, may **in that year or within six years after its expiration make an assessment or additional assessment**, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year. (emphasis added)

[15] In the present case assessments had been made by the respondent (exh. C2). The respondent found that the appellant is not entitled to claim industrial building allowance and capital allowance for Years of Assessment 1997-2000. The respondent says it re-computed and revised the tax payable by the applicant and in 2006 it disallowed the capital allowances brought forward from the Years of Assessments 1997 to 2000 to the Year of Assessment 2000.

[16] The respondent says that the re-computation is not an "assessment". I am of the view that it is not the label attached to an act but the nature of the act carried out by the Respondent that determines whether such act is tantamount to an assessment. In the present case I am of the view that the "re-computation" as the respondent calls it involves the same act and

operation as in making an assessment (*The King v. The Deputy Federal Commissioner of Taxation for South Australia; Ex Parte Hooper* [1926] 37 CLR 368 as applied in *ABC v. The Comptroller of Income Tax, Singapore, supra*). Thus to my mind an assessment though labeled as a "re-computation" by the respondent is still an assessment. I agree with the SCIT that the re-computation done by the respondent is tantamount to an assessment.

[17] Section 91(1) provides that an assessment or additional assessment must be made in the year of assessment or within six years after its expiration. In this case the capital allowance were claimed in the Years of Assessment 1997-2000 on preceding year basis. The respondent disallowed the utilization of capital allowance amounting to RM500,198 claimed in the Years of Assessment 1997-2000 (preceding year basis) *via* a Notice of Additional Assessment (Form JA) for the Year of Assessment 2000 dated 14 December 2006 and a Notice of Reduced Assessment (Form JR) for the Year of Assessment 2000 dated 18 May 2007. These Notice of Additional Assessment (Form JA) and Notice of Reduced Assessment (Form JR) are obviously out of time. Thus I agree with the SCIT that s. 91(1) applies. The decision of the SCIT on this issue is affirmed and the appeal is dismissed.

Whether The Tour Promotion, Sponsorship, Sales Promotion And Travelling Are Expenditure Not Allowed As Deduction Under s. 33(1) And/Or s. 39(1) Of The Act

[18] The SCIT found that the expenditure on tour and sales promotions though incurred wholly and exclusively for the production of income are caught under s. 39(1) ITA. In respect of sponsorships the SCIT found that the appellant had failed to furnish evidence to prove that the expenditure incurred were actually incurred. In respect of business trips, the SCIT found that the appellant had failed to prove that these trips were actually business trips incurred wholly and exclusively for the production of income. Therefore the SCIT agreed with the respondent disallowing the expenses incurred for these items and imposing a penalty.

Tour And Sales Promotions

[19] For the appellant it is submitted that the expenditure on tour promotions is deductible under s. 33(1) of ITA as this expenditure was incurred wholly and exclusively in the production of the appellant's income in order to get, maintain and increase sales. It

is submitted that tour promotion is part of the appellant's trade discount and the trade discount or rebate is given based on volume purchased by the dealers. The trade discount or rebate enables the dealers to pay less for the appellant's products and the higher the volume purchased, the more trade discount or rebate will be given to the dealers which translate into lower price of the products purchased by the dealers. Despite what is stated in the appellant's sales campaign circular that "no credit note or cash *in lieu* of trip is allowed" and "all trip in kind will strictly base on invoice price" (see exh. D p. 16) the appellant allows the dealers to exchange the tour with credit notes or rebates.

[20] It is further submitted that the consideration moving from the dealers is the achievement of stipulated sales targets and the consideration moving from the appellant is the tour or credit notes or rebates or cash *in lieu* of the tour. The appellant is obliged to give the trade discounts/rebates in the form of credit notes or tours to those dealers who achieved the stipulated sales target. The tour promotion was not given to the appellant's dealers gratuitously and without consideration and there is no hospitality of any kind. It is submitted that the sole object of the tour promotion is to increase sales of the appellant's products. There is no entertainment provided as the dealers are merely being given their contractually binding reward or remuneration. Thus counsel submits that the tour promotion is part of the appellant's trade discount/rebate structure and there is no element of entertainment and therefore s. 39(1) does not apply.

[21] In respect of sponsorships and sales promotions it is submitted that the SCIT had made findings of facts that the expenditure incurred were indeed incurred wholly and exclusively in the production of income. Having made findings of facts counsel submits that the conclusion by the SCIT that the appellant had failed to furnish evidence to prove that the expenses were actually incurred is unreasonable.

[22] For the respondent counsel submits that expenditure incurred by the appellant for tour promotions and sales promotions were disallowed because the expenditure is caught by s. 39(1) of ITA. It is submitted that these expenditures are not trade discounts because the appellant's sales campaign circular clearly states that "no credit note or cash *in lieu* of trip is allowed" and "all trip in kind will strictly base on invoice price" (see exh. D

p. 16). Counsel submits that the court ought to give effect to the sales campaign circular. It is submitted that expenses incurred for the dealers' overseas incentive trips where the dealers are not employees of the appellant are not allowed.

[23] In respect of sponsorships, counsel submits that the expenses incurred in renovation/outlet opening are capital in nature because the setting up of permanent structures at the dealers' premises provided an enduring benefit which are disallowed as capital expenditure under s. 39(1)(c). In respect of opening of dealer's branch the expenditure is disallowed because the appellant gave sponsorship in the form of cash. It is further submitted that the appellant had failed to provide documents to support its claim. Counsel submits that the onus is on the taxpayer to prove that an assessment is excessive or erroneous.

[24] The SCIT found as follows:

(i) the expenses incurred for tour and sales promotion were disallowed because it is caught under s. 39(1) of the Act even though it was incurred wholly and exclusively for the production of income;

(ii) the appellant had failed to furnish evidence to prove that the expenditure on sponsorships were actually incurred;

(iii) the appellant had failed to prove that the trips were actually business trips incurred wholly and exclusively for the production of income.

Decision

[25] It is the nature of the expenditure that determines its deductibility (*Arthur Murray (NSW) Pty Ltd v. Federal Commissioner of Taxation* [1965] 114 CLR 314). The expenditure is deductible if it was incurred for the purpose of earning profits and it is necessary for that purpose (*Director-General of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] 1 LNS 141). If the purpose of the act which entails expenditure is to earn income, then the attendant expenditure is deductible (*RB Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1995] 2 MSTC 2,360).

[26] Findings of primary facts by the special commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself (*Chua Lip Kong v. Director-General of Inland Revenue* [1981] 1 LNS 157, Privy Council). From the proved or

admitted facts the SCIT found that "tour promotions", "sponsorship" and "sales promotion" are given *via* credit notes or rebates which are inextricably linked to sales transactions and the dealers finally bear the ultimate costs of the same. "Tour promotion" is part of trade discount and/or rebate structure practiced by the appellant as part of its strategy to generate and encourage sales "at the ultimate cost and expense of the dealers". The trade discount/rebate is already imputed in the appellant's product price. Therefore it is the dealers who ultimately bear the costs of the trips. The trade discount/rebate works in terms of getting a dealer to promote sales as the dealer tend to push harder at the end of the year to achieve the published targets and they do not want to lose out on what is in the trade discount/rebate package. The dealers do not regard trade discounts whether in the form of rebates, credit notes or trips as "free gifts" as they have to earn them. It is a finding of fact that despite the sales campaign circular the appellant does allow credit notes or cash *in lieu* of trip despite the appellant's sales campaign brochure. In respect of "sponsorship" and "sales promotions" the SCIT found that these items are part of the standard sales and promotional practice in electronics and home appliance sale industry. The SCIT found that the costs of "sponsorships" and "sales promotions" are imputed in the appellant's product price and given *via* credit notes or rebates. Thus the dealers ultimately bear such costs. Therefore from the proved and admitted facts the SCIT was satisfied that insofar as tour promotions, sales promotions and sponsorships are concerned, the expenses incurred were wholly and exclusively for the production of income.

[27] In the case of *Margaret Luping & Ors v. Ketua Pengarah Hasil Dalam Negeri* [2000] 3 CLJ 409 the Court of Appeal said:

> In our view, for a taxpayer to qualify for deduction of any payment or expenditure incurred by him he must first of all place the payment or expenditure as allowable under s. 33 of the Act. He has to justify that the payment or the expenditure incurred by him is an allowable deduction under s. 33 of the Act. In the present appeal it is sub-s. (1) of that section. If the payment or expenditure is not allowed under s. 33(1) of the Act then it would not be allowed as a deduction. On the other hand, if it is allowed as a deduction under s. 33(1) of the Act, one has to proceed to the next step to ascertain whether the payment is caught under s. 39(1) of the Act. If it is caught under s. 39(1) of the Act, then it would not be allowed as a deduction though it is allowable under s. 33(1) of the Act.

[28] The SCIT found that expenses for tour and sales promotions though incurred wholly and exclusively for the production of income are caught by s. 39(1) ITA which provides as follows:

> 39. Deductions not allowed.
>
> (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of:
>
> (a)-(k)
>
> (l) a sum equal to fifty percent of any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment:
>
> Provided that this paragraph shall not apply to the following expenses:
>
> (i) the provision of entertainment to his employees except where such provision is incidental to the provision of entertainment for others;
>
> (ii) the provision of entertainment by a person who carries on a business which consists of or includes the provision for payment of entertainment to clients or customers of that business and that entertainment is provided for payment by the clients or customers in the ordinary course of that business;
>
> (iii) the provision of promotional gifts at trade fairs or trade or industrial exhibitions held outside Malaysia for the promotion of exports from Malaysia;
>
> (iv) the provision of promotional samples of products of the business of that person;
>
> (v) the provision of entertainment for cultural or sporting events open to members of the public, wholly to promote the business of that person;
>
> (vi) the provision of promotional gifts within Malaysia consisting of articles incorporating a conspicuous advertisement or logo of the business;
>
> (vii) the provision of entertainment which is related wholly to sales arising from the business of that person;

(viii) the provision of a benefit or amenity to an employee consisting of a leave passage to facilitate a yearly event within Malaysia which involves the employer, the employee and the immediate family members of that employee; or

[29] The question whether expenses incurred amount to entertainment or otherwise within the meaning of s. 39(1) of ITA was dealt with in the case of *Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2007] 5 CLJ 353 where in his judgment Gopal Sri Ram JCA (as he then was) referred to the case of *Bentleys, Stokes & Lowless v. Beeson* [1952] 2 All ER 82 and the judgment of Romer LJ as follows:

> Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?
>
> It is, as we have said, a question of fact. And it is quite clear that the purpose must be the sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate.

[30] The SCIT has not provided reasons why the expenses incurred in respect of tour and sale promotions are caught under s. 39(1). It is a mere statement without proper reference to or evaluation of the admitted or proved facts. The SCIT has failed to consider that even though tour and sale promotions may involve some element of entertainment, the entertainment is 'necessarily inherent' in such activities. In *Bentleys, Stokes & Lowless v. Beeson (supra)* Romer LJ said:

> ... if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is **necessarily inherent** in the act. (emphasis added)

[31] I find from the proved or admitted facts that the trips and sales promotion were not given gratuitously and even if there is any element of entertainment, such entertainment is necessarily inherent. Therefore the expenditures incurred in respect of tour and sales promotions are not caught by s. 39(1). Consequently the appeal in respect of these items is allowed.

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Sponsorships

[32] In respect of sponsorships the SCIT found that the appellant had failed to furnish evidence to prove that the expenses were actually incurred. There is no mention whether the SCIT found that these expenditures were incurred wholly and exclusively for the production of income. From its decision it appears that it was not an issue with the SCIT. The only issue was lack of evidence.

[33] I agree with the appellant that the appellant had furnished ample evidence to support its claim on expenditures incurred for sponsorships (exh. D p. 76-92). Therefore the SCIT erred when it found that the appellant had failed to furnish proof of expenses incurred for sponsorships. The finding of the SCIT is contrary to the evidence. The decision of the SCIT in respect of sponsorships and the penalty imposed is set aside. The appeal in respect of sponsorships is allowed.

Travelling Expenditure

[34] The SCIT found that the appellant had failed to prove that the trips were actually incurred wholly and exclusively for the production of income. The SCIT found as admitted or proved that the business travel:

(i) is primarily to meet the appellant's foreign business partners (the suppliers or manufacturers) to carry out market exploration and to participate international exhibitions;

(ii) are primarily undertaken by the managing director and purchasing manager of the appellant. All these trips were undertaken for genuine business purposes and calculated to bring benefit to the appellant;

(iii) although the appellant's products are mainly sold in local market, the appellant procures some of its products from foreign manufacturers, and hence there are a lot of instances where the appellant pays a visit to its foreign manufacturers' factory outlets and understand the operation of these factories, business meeting with the foreign manufacturers etc.;

(iv) travelling is necessary for survival in the ultra competitive market in which the appellant is operating and the appellant cannot afford to be insular in its approach to business where market exploration and learning from foreign practices are the key to success in business or the appellant will be put out of business in this rapidly changing market.

[35] The appellant submits that the finding of the SCIT is inconsistent with the finding of fact. Records kept by the appellant relating to business trips were tendered before the SCIT (exh. D p. 69-75). For the respondent it is submitted that the appellant had failed to furnish proof such as minutes of meetings, itinerary or other documents to support its claim. There is no proof that these trips were purely for the appellant's business. Counsel submits that the appellant is wholly owned by Pensonic Holdings Berhad so there is no reason for the appellant to undertake these business trips since the appellant is only a trading company trading in electronic products locally. Counsel for the appellant submits that it is not unreasonable for the appellant's managing director and purchasing manager to undertake such trips. These trips were on economy class and budget airlines were used where possible.

[36] Having perused the evidence tendered in relation to the claim on business trips, I agree with the SCIT that there is insufficient proof that the expenditures incurred for these trips were incurred wholly and exclusively for the production of income. Therefore the decision of the SCIT is affirmed and the appeal is dismissed.

[37] The appellant is ordered to pay costs of RM1,200 and the respondent is ordered to pay costs of RM2,800.